

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DONNA M. TUCKER and TROY	:	
TUCKER,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	
	:	NO. 02-2421
MEREK & CO., INC.,	:	
	:	
Defendant.	:	

**MEMORANDUM**

Giles, C.J.

December 2, 2002

**I. Introduction**

Donna M. Tucker and Troy Tucker have brought this action against Merek & Co., Inc. (“Merek”) seeking damages based on the following state law claims: intentional interference with contract (Count One), defamation (Counts Two and Three), invasion of privacy (Count Four), and civil conspiracy (Count Five), alleging psychological injuries resulting from the termination of Donna Tucker’s employment by Merek. Jurisdiction is based upon diversity of citizenship and the amount in controversy.

Now before the court is Merek’s Motion to Dismiss Counts One, Two, and Five pursuant to Fed. R. Civ. Proc. 12(b)(6). For the reasons that follow, the motion is granted in part and denied in part.

**II. Factual Background**

Consistent with the review standards applicable to a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6), the alleged facts, viewed in the light most favorable to the plaintiffs, follow.

Donna Tucker <sup>1</sup>(“Ms. Tucker”) was employed by Merek from July 1989 until November 1999. (Compl. ¶5.) In November 1999, Ms. Tucker left Merek to work for Bristol-Meyers Squibb Company (“BMS”). (Compl. ¶5.) Ms. Tucker worked at BMS from November 1999 until filing her resignation with BMS on April 18, 2001. (Compl. ¶¶5-6.) In the beginning of 2001, Ms. Tucker began to negotiate a new employment agreement with Merek. (Pl.’s Ex. A.) Ms. Tucker does not allege that these negotiations occurred with the knowledge and consent of BMS, a direct competitor of Merek. In a letter dated January 23, 2001, Ms. Tucker was offered a Business Manager position, which she accepted on January 30, 2001. (Pl.’s Ex. A.) Ms. Tucker did not allege that Merek was aware of her continued employment at BMS following the acceptance of a Merek position. The Merek letter offered a start date of February 5, 2001, but stated that the date was negotiable. (Pl.’s Ex. A.) Ms. Tucker claims that she did not start working for Merek until April 18, 2001. (Compl. ¶6.) Prior to her resignation from BMS, Ms. Tucker participated in job training at Merek. (Compl. ¶6.) Ms. Tucker does not allege that she was not on the Merek payroll, for wage and benefit purposes, upon the commencement of the training, or that the time spent training was unpaid.

In early April 2001, five employees of defendant—Marvin Johnson, Jim Murphy, Jack Scott, Jennifer McClellan, and Donna Jones (“Merek Five”)—and three employees of BMS—Briam Linsey, Frank Biviano, and Brenda Martini Wakin (“BMS Three”)—allegedly fabricated information and documents regarding Ms. Tucker’s employment with BMS and Merek. (Compl. ¶7.) Ms. Tucker asserts that as a result of communications between these two employee groups,

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<sup>1</sup>Since Merek’s Partial Motion to Dismiss seeks to dismiss solely as to Donna Tucker, only the facts relevant to her claims are discussed here.

her relationship with Merek was intentionally undermined. (Pl.'s Answer at 2.)

On April 25, 2001, Ms. Tucker was called into a meeting with several Merek and BMS employees. (Compl. at ¶8.) There, a BMS employee accused Ms. Tucker of still having BMS property in her possession and threatened to file criminal charges of theft against her unless she signed a statement declaring she had not shared BMS's proprietary information with Merek. (Compl. ¶8.) Ms. Tucker denied providing Merek with any of BMS's proprietary information and signed a statement to that effect. (Compl. ¶8.) A few moments later, Ms. Tucker was terminated by Merek employees. (Compl. ¶¶8-9.)

### **III. Discussion**

#### **A. Legal Standard for 12(b)(6) Motion to Dismiss**

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6), this court must “accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them.” Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990). The court will only dismiss the complaint if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

#### **B. Count One: Intentional Interference with Contract**

Plaintiff asserts two separate claims of intentional interference: interference with a prospective relationship that occurred before Ms. Tucker began her employment with Merek on April 18, 2001; and interference with her existing contractual relationship with Merek after her employment commenced. (Pl.'s Answer at 4n.1.) Defendant argues that each of these claims fails as a matter of law. (Def.'s Reply Mem. at 4-8.)

When bringing a claim for intentional interference with contract under Pennsylvania law, a plaintiff must plead the following elements: 1) the existence of a contractual or prospective contractual relationship; 2) purposeful action on the part of the defendant, specifically intended to harm the existing relationship or prevent the prospective relationship; 3) absence of privilege or justification on the part of the defendant; and 4) actual legal damages as a result of the defendant's conduct. Crevelliv. General Motors Corp., 215 F.3d 386, 394 (3d Cir. 2000); Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979) (discussing elements required for interference with a prospective contract).

Ms. Tucker alleges two claims of tortious interference against Merek. First, Ms. Tucker contends that prior to the commencement of her employment with Merek on April 18, 2001, the Merek Five interfered with her prospective employment relationship. (Pl.'s Answer at 5.) She claims that in early April they began meeting with the BMSThree to exchange and fabricate information concerning her employment with Merek. (Compl. ¶ 7.) Plaintiff alleges a separate claim of intentional interference with an employment relationship for the time period after April 18, 2001, when Ms. Tucker was working for Merek. (Pl.'s Answer at 5-6.) While few specifics are given by Ms. Tucker, she alleges that the Merek Five, along with the BMSThree, were falsifying information and documents about her that eventually resulted in her termination. (Compl. at ¶¶ 7, 12.) Defendant argues that the interference claim must fail because there was no third party interference involved. (Def.'s Mem. in Supp. of Mot. to Dismiss at 3-7.)

An intentional interference claim cannot succeed when a plaintiff alleges that a party to the contract interfered with the contract. Maierv. Maretti, 671 A.2d 701, 707 (Pa. Super. Ct. 1995) (noting that it is essential to a tortious interference claim that "there must be a contractual

relationship between the plaintiff and a party other than the defendant”); see also Richardson v. John F. Kennedy Mem’l Hosp., No. 92-2899, 1993 WL 45950, at \*4 n.8 (E.D. Pa. Feb. 17, 1993). In the complaint Ms. Tucker alleges that the Mere Five, all Mere employees, interfered with her contract with Mere. (Compl. ¶¶ 7, 12.) Generally, a corporation’s agent is not considered a third party to a contract. See Maier, 671 A.2d at 707 (“a corporation acts only through its agents and officers, and such agents or officers cannot be regarded as third parties when they are acting in their official capacity”). “Acts of a corporate agent which are performed within the scope of his or her authority are binding on the corporate principal,” and therefore, employees and their corporate employer are treated as one and the same, not as separate entities. Daniel Adams Assocs., Inc. v. Rimbach Publishing, Inc., 519 A.2d 997, 1000 (Pa. Super. Ct. 1986)

A corporation’s employee can act as a third party, however, when the employee was acting outside of the scope of employment. Maier, 671 A.2d at 707 ; Daniel Adams, 519 A.2d at 1001; see also Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 173 (3d Cir. 2001) (“acts committed by an agent outside of the scope of employment or agency may satisfy the ‘tripartite relationship’ required for a tortious interference claim” (internal citation omitted)). A plaintiff has the burden to establish that an individual acted outside the scope of employment. See Silvestre v. Bell Atlantic Corp., 973 F.Supp. 475, 486 (D.N.J. 1997), aff’d 156 F.3d 1225 (3d Cir. 1998).

Here, Ms. Tucker has not brought an individual suit against any of the employees and has not filed a motion to amend the complaint accordingly. If an individual was acting outside of the scope of employment, an individual suit would be required to create the necessary third party. See

Ramsbottom v. First Pennsylvania Bank, N.A., 718 F. Supp. 405, 411-12 (D.N.J. 1989)

(rejecting tortious interference claim based on respondeat superior liability as having no third party). Plaintiff appears to be alleging respondeat superior liability for the Mere employees. However, for respondeat superior liability to be available an employee must be acting within the scope of employment, foreclosing any action against the employee for tortious interference with a contract. Id.

Further, Ms. Tucker has not alleged that the Mere Fiv were acting outside the scope of their employment. It is undisputed that a contract can be terminated by a corporate agent acting within the scope of her authority. See Daniel Adams, 519 A.2d at 1002 (“where... a plaintiff has entered into a contract with a corporation, and that contract is terminated by a corporate agent who has acted within the scope of his or her authority, the corporation and its agents are considered one so that there is no third party against whom a claim for contractual interference will lie.”). Defendant argues that, as a matter of law, the Mere employees were acting within the scope of their employment when Ms. Tucker’s employment was terminated, and thus do not satisfy the third party requirement of a tortious interference claim. (Def.’s Reply at 7).

Defendant asserts that each had a job that plainly involved the review of employees in order to make decisions concerning hiring and termination. (Def.’s Reply at 7). Defendant identifies the Mere employees as follows: Marvin Johnson, Senior Business Director; Jim Murphy, Security Director; Jack Scott, Security Investigator; Jennifer McClellan, Director of Human Resources; and Donna Jones, Human Resources Manager. (Def.’s Reply at 7). Defendant argues that all plaintiff’s allegations of intentional interference with a contract involved decisions of whether to terminate Ms. Tucker based on Ms. Tucker’s possible employment with a Mere competitor and,

thus, each alleged interfering act was within the scope of the individuals' employment with Merek. (Def.'s Reply at 7).

Without an allegation that the employees acted outside of the scope of their jobs, Ms. Tucker has not demonstrated the required third party interference with her contract. Thus, her claims of intentional interference fail, as a matter of law.

### **C. Count Two: Defamation**

Ms. Tucker asserts that Merek defamed her during the meeting on April 25, 2001. (Compl. ¶ 16). Merek argues that Ms. Tucker has failed to state a claim because the alleged statement is incapable of a defamatory meaning. (Def.'s Mem. in Supp. of Mot. to Dismiss at 7-8.)

When bringing a claim for defamation pursuant to Pennsylvania law the plaintiff must plead the following elements: 1) the defamatory character of the communication; 2) its publication by the defendant; 3) its application to the plaintiff; 4) the understanding by the recipient of its defamatory meaning; 5) the understanding by the recipient of its intended to be applied to the plaintiff; 6) special harm resulting to the plaintiff from its publication; and 7) abuse of a conditionally privileged occasion. Pa. Cons. Stat. Ann. § 8343(a) (Purdons 1982).

#### **a. Defamatory Character of the Communication**

Defendant argues that Ms. Tucker's claim should be dismissed because the alleged statement, that the plaintiff was dually employed, is not defamatory in character. (Def.'s Mem. in Supp. of Mot. to Dismiss at 7.) Defendant supports its argument by alleging that, "A statement that an individual is simultaneously working for two employers is incapable of defamatory meaning." (Def.'s Mem. in Supp. of Mot. to Dismiss at 8.) Defendant cites no authority to

directly support this proposition.

It is the function of the court to determine whether the communication claimed of is capable of a defamatory meaning. Rybas v. Wapner, 457 A.2d 108, 110 (Pa. Super. Ct. 1983). Generally, a communication is defamatory if it tends to harm the reputation of another by lowering her in the estimation of the community or to deter third persons from associating with her. Maier, 671 A.2d at 704; 12<sup>th</sup> Street Gym, Inc. v. General Star Indem. Co., 93 F.3d 1158, 1163 (3d Cir 1996). “A communication is also defamatory if it ascribes to another conduct, character or a condition that would adversely affect [her] fitness for the proper conduct of [her] proper business, trade, or profession.” Maier, 671 A.2d at 704 ; see also Gordon v. Lancaster Osteopathic Hosp. Ass’n, Inc., 489 A.2d 1364, 1368 (Pa. Super. Ct. 1985). “If the court determines that the challenged publication is not capable of a defamatory meaning, there is no basis for the matter to proceed to trial; however, if there is an innocent interpretation and an alternative defamatory interpretation, the issue must proceed to the jury.” Maier, 671 A.2d at 704. In determining whether the communication is defamatory, the court must consider the effect the statement would fairly produce, or the impression that it would naturally engender, in the mind of the audience among whom it was intended to circulate. Id.; see also Livingston v. Murray, 612 A.2d 443, 447 (Pa. Super. Ct. 1992).

While allegations of dual employment are not per se defamatory, Ms. Tucker argues that the statements regarding her dual employment were published to indicate that she had been deceiving Merck and BMS regarding her employee status. (Compl. ¶20.) In such a context, the statement labeled Ms. Tucker as deceptive and untrustworthy, character traits that would prevent employers from wishing to hire her. Assuming these facts to be true, plaintiff states a claim for



defamation as a matter of law.

**D. Count Five: Civil Conspiracy**

When making a claim for civil conspiracy, plaintiff must plead: 1) two or more persons;  
2) combined or agreed; 3) with intent to perform an unlawful act, or to perform an otherwise  
lawful act by unlawful means or for an unlawful purpose. Thompson v. Coal Co. v. Pike Coal

Co., 412 A.2d 466, 472 (Pa. 1979). Plaintiff alleges that the Mere Five and the BMST Three  
conspired to defame Ms. Tucker, and conspired to intentionally interfere in the employment  
relationship between Ms. Tucker and Mere. Mere argues that Ms. Tucker's conspiracy claims  
fail because the alleged underlying unlawful acts fail as a matter of law. (Def.'s Mem. in Supp.  
of Mot. to Dismiss at 9.) These alleged offending individuals have not been sued. Therefore,  
there is no claim stated as against Mere.

**E. Conclusion**

For the foregoing reasons, the Partial Motion to Dismiss is granted in part and denied in  
part. An appropriate order follows.